

## Department of Justice

## § 28.21

(3) Aliens held in connection with maritime interdiction; or

(4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.

(c) The DNA-sample collection requirements under this section shall be implemented by each agency by January 9, 2009.

(d) Each individual described in paragraph (a) or (b) of this section shall cooperate in the collection of a DNA sample from that individual. Agencies required to collect DNA samples under this section may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) or (b) of this section who refuses to cooperate in the collection of the sample.

(e) Agencies required to collect DNA samples under this section may enter into agreements with other agencies described in paragraph (a) or (b) of this section, with units of state or local governments, and with private entities to carry out the collection of DNA samples. An agency may, but need not, collect a DNA sample from an individual if—

(1) Another agency or entity has collected, or will collect, a DNA sample from that individual pursuant to an agreement under this paragraph;

(2) The Combined DNA Index System already contains a DNA analysis with respect to that individual; or

(3) Waiver of DNA-sample collection in favor of collection by another agency is authorized by 42 U.S.C. 14135a(a)(3) or 10 U.S.C. 1565(a)(2).

(f) Each agency required to collect DNA samples under this section shall—

(1) Carry out DNA-sample collection utilizing sample-collection kits provided or other means authorized by the Attorney General, including approved methods of blood draws or buccal swabs;

(2) Furnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of anal-

ysis and entry of the results of the analysis into the Combined DNA Index System; and

(3) Repeat DNA-sample collection from an individual who remains or becomes again subject to the agency's jurisdiction or control if informed that a sample collected from the individual does not satisfy the requirements for analysis or for entry of the results of the analysis into the Combined DNA Index System.

(g) The authorization of DNA-sample collection by this section pursuant to Public Law 106-546 does not limit DNA-sample collection by any agency pursuant to any other authority.

[AG Order 3023-2008, 73 FR 74942, Dec. 10, 2008]

### § 28.13 Analysis and indexing of DNA samples.

(a) The Federal Bureau of Investigation shall carry out a DNA analysis on each DNA sample furnished to the Federal Bureau of Investigation pursuant to section 3(b) or 4(b) of Public Law 106-54, and shall include the results in the Combined DNA Index System.

(b) The Federal Bureau of Investigation shall include in the Combined DNA Index System the results of each analysis furnished to the Federal Bureau of Investigation pursuant to 10 U.S.C. 1565(b)(2).

### Subpart C—Preservation of Biological Evidence

SOURCE: Order No. 2762-2005, 70 FR 21957, Apr. 28, 2005, unless otherwise noted.

#### § 28.21 Purpose.

Section 3600A of title 18 of the United States Code ("section 3600A") requires the Government to preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under a sentence of imprisonment for such offense, subject to certain limitations and exceptions. The general purpose of this requirement is to preserve biological evidence for possible DNA testing under 18 U.S.C. 3600. Subsection (e) of section 3600A requires the Attorney General to promulgate regulations to implement and enforce section 3600A, including appropriate disciplinary

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sanctions to ensure that employees comply with such regulations.

### § 28.22 The requirement to preserve biological evidence.

(a) *Applicability in general.* The requirement of section 3600A to preserve biological evidence applies to evidence that has been retained in cases in which the offense or conviction occurred prior to the enactment of section 3600A or the adoption of this subpart, as well as to evidence secured in pending and future cases.

(b) *Limitation to circumstances in which a defendant is under a sentence of imprisonment for the offense.* The requirement of section 3600A to preserve biological evidence secured in the investigation or prosecution of a Federal offense begins to apply when a defendant is convicted and sentenced to imprisonment for the offense, and ceases to apply when the defendant or defendants are released following such imprisonment. The evidence preservation requirement of section 3600A does not apply in the following situations:

(1) *Inapplicability at the investigative stage.* The requirement of section 3600A to preserve biological evidence does not apply at the investigative stage of criminal cases, occurring prior to the conviction and sentencing to imprisonment of a defendant. Biological evidence may be collected and preserved in the investigation of Federal offenses prior to the sentencing of a defendant to imprisonment, reflecting sound investigative practice and the need for evidence in trial proceedings that may result from the investigation, but section 3600A does not govern these activities.

(2) *Inapplicability to cases involving only non-incarcerative sentences.* The requirement of section 3600A to preserve biological evidence does not apply in cases in which defendants receive only nonincarcerative sentences, such as probation, fines, or payment of restitution.

(3) *Inapplicability following release.* The requirement of section 3600A to preserve biological evidence ceases to apply when the defendant or defendants are released following imprisonment, either unconditionally or under supervision. The requirement does not

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apply during any period following the release of the defendant or defendants from imprisonment, even if the defendant or defendants remain on supervised release or parole.

(4) *Inapplicability following revocation of release.* The requirement of section 3600A to preserve biological evidence applies during a defendant's imprisonment pursuant to the sentence imposed upon conviction of the offense, as opposed to later imprisonment resulting from a violation of release conditions. The requirement does not apply during any period in which the defendant or defendants are imprisoned based on the revocation of probation, supervised release, or parole.

(c) *Conditions of preservation.* The requirement of section 3600A to preserve biological evidence means that such evidence cannot be destroyed or disposed of under the circumstances in which section 3600A requires its preservation, but does not limit agency discretion concerning the conditions under which biological evidence is maintained or the transfer of biological evidence among different agencies.

### § 28.23 Evidence subject to the preservation requirement.

(a) *Biological evidence generally.* The evidence preservation requirement of section 3600A applies to “biological evidence,” which is defined in section 3600A(b). The covered evidence is sexual assault forensic examination kits under section 3600A(b)(1) and semen, blood, saliva, hair, skin tissue, or other identified biological material under section 3600A(b)(2).

(b) *Biological evidence under section 3600A(b)(2).* Biological evidence within the scope of section 3600A(b)(2) is identified biological material that may derive from a perpetrator of the offense, and hence might be capable of shedding light on the question of a defendant's guilt or innocence through DNA testing to determine whether the defendant is the source of the material. In greater detail, evidence within the scope of section 3600A(b)(2) encompasses the following:

(1) *Identified biological material.* Beyond sexual assault forensic examination kits, which are specially referenced in section 3600A(b)(1), section